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IN THE

Supreme Court of the United States

October Term 1974

No. 74-541

JOHN D. McGREGOR AND
ROBERT FLETCHER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit

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The petitioners, John D. McGregor and Robert Fletcher, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 7, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1974, and this Petition is filed within thirty days of this date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the venue requirements of Article III, Section 2 and the Sixth Amendment of the Constitution and the provisions of Rule 21, Federal Rules of Criminal Procedure, were violated by the refusal to transfer this mail fraud prosecution from Minnesota to Louisiana where all of the acts attributed to the petitioners occurred, where most of the witnesses were located, and where all nexes of the alleged offense were found except for the receipt of certain mail matter in Minnesota?

CONSTITUTIONAL PROVISIONS INVOLVED

Article 3, Section 2, Paragraph 3.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained

by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISION INVOLVED

18 U.S.C. §3237. Offenses begun in one district and completed in another.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the dis-

trict in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information. June 25, 1948, c. 645, 62 Stat. 826; Aug. 6, 1958, Pub.L. 85-595, 72 Stat. 512; Nov. 2, 1966, Pub.L. 89-713, §2, 80 Stat. 1108.

RULE INVOLVED

Rule 21, Federal Rules of Criminal Procedure: Transfer From the District for Trial

(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district.

STATEMENT OF THE CASE

Jurisdiction of the United States District Court was invoked in this matter in the first instance by an indictment charging these petitioners with twenty-six violations of 18 U.S.C. §1341, mail fraud. A jury trial resulted in convictions upon all counts, which were affirmed by the Court of Appeals for the Eighth Circuit in an opinion filed October 7, 1974, for review of which this petition prays.

In 1960 the petitioners established the Fountain Insurance Agency (hereafter Fountain) in Baton Rouge, Louisiana, selling principally collision insurance on newly-purchased automobiles. R., Vol. III, 61-64. The Agency and their subagents, such as automobile dealers, wrote policies for several companies including Northland Insurance Company of Minnesota (hereafter Northland), whose agreement with them was negotiated by one Emil Zelier as Northland's "special representative." R., III, 70. The agreement was a "retrospective" contract, whereunder Fountain sent 100% of premiums to Northland, which took 20% for itself and credited 80% to Fountain's account, from which Fountain paid all claims on Northland checks. R., I, 24-28. Because Fountain also paid 20% of premiums to its salesmen or subagents, and had other expenses, a "cash flow" problem developed. R., III, 66.

Petitioners conferred with other agents experiencing the same problem, with Mr. Zeller, and with the office of the Louisiana Insurance Commission. R., III, 79-80. Thereafter, having first discussed the procedure with these persons and not having been discouraged from doing so, they undertook to cancel certain policies with Northland, receiving pro-rata credits

for unearned premiums; at the same time, although in each such case they sent to Northland a certificate indicating the policy-holder and lien-holder (if any) had been sent a notice of cancellation, no such notices were in fact sent to these persons. R., II, 6-14. Instead Fountain treated these policies as live policies and paid claims arising on them, and did not pass the refunded premiums on to the policy-holders. R., III, 105.

Later many of the cancelled policies were reinsured with Northland, at a lower rate, and under a slightly different name; Fountain was entitled to set its own rates, and the name alteration, petitioner McGregor testified, was to prevent their computer from rejecting these renewed applications as it was programmed to do with previously rejected applicants. R., III, 86-89. Petitioner McGregor testified that there had been no intent to defraud, but only to improve Fountain's cash-flow by avoiding the debilitating pre-payment of (in effect) 120% of premiums. R., III, 73.

Before trial petitioners moved, pursuant to Rule 21(b), Federal Rules or Criminal Procedure, for transfer of the trial to the Middle District of Louisiana where they resided and where all the alleged acts (except for the receipt of the mail matter in Minnesota) took place. The motion was denied. Of the witnesses who testified at trial, sixteen resided in Louisiana (R., I, 64; II, 2, 24, 41, 58, 73, 77, 82, 85; III, 2, 5, 8, 50, 54, 56, 59), one in Oklahoma and only five in Minnesota. (R. I, 20, 53, 99; III, 11, 35). Petitioners asserted in their motion to transfer a desire to call other witnesses from Louisiana, but at trial did not.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE LETTER AND SPIRIT OF THE VENUE PROVISIONS OF THE CONSTITUTION, AND OF RULE 21(b), FEDERAL RULES OF CRIMINAL PROCEDURE, AS CONSTRUED BY THIS COURT.

The Constitution provides twice, as to federal and state crimes, that the trial of criminal cases shall be in the State where the crime was "committed." Art. III, Sec. 2; Amendment VI. Congress undertook to gloss or re-define the Constitutional notion of where a crime is "committed" in enacting 18 U.S.C. §3237(a), which provides, *inter alia*, that an offense involving the mails may be prosecuted in any district "from, through, or into which" the culpable mail matter moves.

It is clear that in this age of inexpensive and rapid mail service, a single such offense could readily be "committed" in virtually every judicial district of the nation within a single day. This fact of modern life, together with the increasing prevalence of mail fraud prosecutions, threatens to render the venue provisions of the Constitution meaningless except in the most fictitious sense. The Congress may have contemplated such a result in §3237(a), but the Framers in their genius may also have foreseen and proscribed it. Without asserting that §3237(a) is necessarily unconstitutional *per se*, petitioners respectfully submit that this prosecution exemplifies the erosion of the Constitutional notion of venue which that section has facilitated in the lower courts and which requires this Court's renewed scrutiny.

Ironically Rule 21(b), designed for the benefit of the defendant who finds himself charged in a remote jurisdiction, is now treated as a discretionary instrument of largesse in a case

such as this involving multiple venue problems, as the decision below reflects.

This Court in *Travis v. United States*, 364 U.S. 631, 634 (1961), recently reaffirmed that "questions of venue are more than matters of mere procedure" but rather "raise deep issues of public policy." There it was held that a prosecution for filing a false affidavit could be venued only at the place of filing the affidavit, not at the place of its mailing, at least in the absence of a specific provision to the contrary. Earlier, in *United States v. Johnson*, 323 U.S. 273 (1944), it had been held, again in the absence of explicit contrary legislation, that a violation of the Federal Denture Act could be prosecuted only in the District of sending. Mr. Justice Frankfurter's dictum (at 323 U.S. p. 274-275) seems to envision a rather plenary power in Congress to alter this by specific legislation, such, perhaps, as §3237.

But, assuming this is true and correct, petitioners suggest that the Constitutional venue provisions nevertheless represent a barrier to unlimited Congressional or Judicial expansion and redefinition, a barrier which is frequently crossed in mail fraud cases, and was crossed in the present prosecution.

Since 18 U.S.C. §3237(a) purports to place venue in any district that mail matter touches upon, Rule 21(b) has now come to be treated as a source of purely discretionary relief from inconvenience or a denial of "the interest of justice" in cases where the Court is persuaded that transfer is proper. The Courts of Appeals, in turn, decline to disturb a refusal to transfer without a showing by the accused that "some substantial right has actually been affected," as the Court of Appeals said in affirming these petitioners' convictions. And see *United States v. Phillips*, 433 F.2d 1364 (8th Cir. 1970).

The terrible irony of this is that the ostensibly clear Constitutional command of Art. III §2 and the Sixth Amendment that an accused *shall* be tried where his crime was "committed" has, by mere legislative and judicial redefinition in cases involving the mails, lost its natural, reasonable and intended meaning, and lost its inherent potency, while the burden has shifted to the accused to show the prejudice of trial in a remote jurisdiction; Rule 21 (b) has, in effect, supplanted the Constitutional provisions.

In *Platt v. Minnesota Mining & Manufacturing*, 376 U.S. 240, 243-244 (1964), this Court set forth the following criteria to guide application of Rule 21(b):

(1) Location of a corporate defendant: (In the present case, Fountain Agency (a defendant at trial) and the individual petitioners were located in Baton Rouge, Louisiana.)

(2) Location of possible witnesses: (Here sixteen Louisiana witnesses testified, only five from Minnesota, and petitioners alleged at the time of the motion to transfer that they had other potential witnesses in Louisiana.)

(3) Location of events likely to be in issue: (In this case every action of the accused and every event in issue took place in Louisiana except for the *receipt* of certain mail matter in Minnesota.)

(4) Location of documents and records likely to be involved: (Here the documentary evidence was not voluminous; some Government exhibits were from Minnesota; but all of the petitioners' records were in Louisiana, and many of them were involved in litigation in Louisiana at the time of trial. R., I, 52; II, 34; III, 92)

(5) Disruption of defendant's business unless the case is transferred: (Petitioners were no longer in the insurance

business, but their employment was naturally disrupted more by a Minnesota trial than if they had been tried in Louisiana.)

(6) Expense to the parties: (This is reflected in the number of Louisiana witnesses and location of documents above.)

(7) Location of counsel: (Petitioners' Louisiana counsel did not try the case in Minnesota but retained Minnesota counsel, another additional expense and inconvenience.)

(8) Relative accessibility of the place of trial: (We have noted that Louisiana was more readily accessible both to petitioners and to a large majority of the witnesses.)

(9) The docket condition in each district: (The record contains no information upon this question.)

(10) Any other special elements which might affect the transfer: (The involvement of petitioners' records in other Louisiana litigation would apply here, as well, as would the location of their sub-offices in Mississippi, Alabama, and Florida.)

Since all of the applicable criteria were satisfied in this case by at least a strong preponderance in favor of transfer, and yet transfer was denied and the denial affirmed, it is apparent that the Constitutional venue commands have been reduced to impotency, unavailing against the prosecutor's mere arbitrary choice of venue in any offense involving the mails.

Petitioners respectfully submit that this Court should reexamine the Constitutional venue provisions, and reaffirm their predominance over conflicting and debilitating provisions such a 18 U.S.C. §3237 and Rule 21.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Dated: October 31, 1974.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1347

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN D. McGREGOR, ROBERT FLETCHER and FOUNTAIN AGENCY, INC., a Louisiana Corporation,

Appellants.

Submitted: September 11, 1974
Filed: October 7, 1974

Appeal from the United States District Court,
District of Minnesota, Third Division

Before LAY, ROSS and WEBSTER, Circuit Judges.

ROSS, Circuit Judge.

John D. McGregor, Robert Fletcher, and Fountain Agency, Inc. were each charged in a twenty-six count indictment with the use of the mail for the purpose of executing a scheme to defraud in violation of 18 U.S.C. § 1341. Specifically, the indictment alleged that the defendants, acting as agents for Northland Insurance Co., caused notification of insurance policy cancellations to be sent to Northland for the purpose of obtaining premium refunds from Northland. However, the defendants' customers, whose policies were cancelled, were never informed of the cancellation. From a verdict finding them guilty of all twenty-six counts, McGregor, Fletcher and

Fountain appeal contending that the court erred in denying their motion for transfer to another district and that the evidence was insufficient to establish that they acted with intent to defraud.

During the relevant time period, Fountain Agency, Inc., an insurance agency incorporated in Louisiana, was primarily involved in selling automobile collision insurance, generally on vehicles newly purchased by high risk drivers. The policies were often written by the auto dealer himself acting as Fountain's subagent and financed together with the purchase price of the auto through finance companies such as General Motors Acceptance Corporation. Fountain, itself, was not the insurer, but merely the agent for several insurance companies, chief among which was Northland Insurance Co., a licensed insurance company in Minnesota.

Fountain had negotiated a retrospective contract with Northland, under the terms of which Fountain earned 80% of the premium and Northland earned 20%. The total premium, however, was forwarded to Northland; the 80% was credited to Fountain's account at Northland and used as a fund out of which all claims by Fountain's insureds were paid. After claims adjustment, if the losses did not exceed the agent's earned premium pool, Northland would refund a pro rata amount of earned premium to Fountain.

These retrospective contracts added to cash flow problems already suffered by Fountain. Not only did Fountain experience a need for revenues to pay operating expenses but it also negotiated collateral contracts with subagents who sold policies under which the subagent, usually the automobile dealer, could retain 20% of the face value of the insurance premium as a commission for the sale of the insurance policy. Fountain thus committed 120% of the premium at the outset.

After it was realized that expanding its business under retrospective contracts did nothing to remedy the cash flow problems, McGregor consulted with other insurance agencies who were also experiencing the same difficulties with retrospective contracts. After consulting with these other agencies and with an employee of the Louisiana Insurance Commission, McGregor determined to undertake a program of cancelling policies without notifying or forwarding refunds to the insured.

Under the plan, notices of cancellation were prepared on arbitrarily selected policies, the originals of which notices were sent to Northland. Copies were prepared for the policyholder and lienholder, but were not sent. Rather, they mailed other documents to the policyholder and the lienholder by registered mail. Certificates of mailing were obtained for these mailings and sent to Northland with the original of the notice of cancellation as false proof that notices of cancellation had been sent to the policyholder and the lienholder. Northland then refunded to Fountain the prorated unearned portion of the premium on the cancelled policy. In effect, these policies were cancelled to the insurer, but not to the policyholders or lienholders who could still hold Northland primarily liable on the policy since they never received notices of cancellation.

During the periods of cancellation, Fountain paid claims against the cancelled policies out of the refunded premiums. As the cash flow situation improved, Fountain began to rewrite the previously cancelled policies with Northland. Names of the policyholders on the reissued policies were changed slightly so that, as McGregor testified, the computer would not reject the policy application. None of the cancelled premiums were ever refunded to the policyholders. Fountain em-

ployees were under instructions to conceal records of these cancellations from Northland representatives. Northland was never reimbursed for its pro rata loss of its 20% premium nor for its potential liability under the policy during the period of cancellation. When delays began to develop in Fountain's ability to pay claims against the cancelled policies and complaints were directed to Northland, the plan came to light.

Motion for Transfer.

The Constitution provides that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been Committed." U.S. CONST. art. III, § 2. The sixth amendment carries a like command. However, FED. R. CRIM. P. 21(b) permits a transfer:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

This Court has held that the grant of transfer under that rule is a matter of the discretion of the district judge. *United States v. Phillips*, 433 F.2d 1364 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). In reviewing the district court's exercise of discretion in these matters, we are guided by the enumeration of factors which were considered in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-244 (1964):

> (1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved;

> and (10) any other special elements which might affect the transfer.

Concerning those factors, the Supreme Court stated that the main office or "home" of the defendant has no independent significance in determining whether transfer to that district would be "in the interest of justice," although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel. *Id.*at 245-246.

18 U.S.C. § 3237(a) provides in part:

> Any offense involving the use of the mails . . . is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such . . . mail matter moves.

The Supreme Court and other circuits have accordingly held that the government may elect to bring the prosecution in the district where the letter was mailed or where it was delivered. *Salinger v. Loisel*, 265 U.S. 224, 233-234 (1924); *Benson v. Henkel*, 198 U.S. 1, 15 (1905); *United States v. Sorce*, 308 F.2d 299, 300 (4th Cir. 1962), *cert. denied*, 377 U.S. 957 (1964); *Kreuter v. United States*, 218 F.2d 532, 534 (5th Cir.), *cert. denied*, 349 U.S. 932 (1955); *Holdsworth v. United States*, 179 F.2d 933, 936 (1st Cir. 1950); *Kaufman v. United States*, 163 F.2d 404, 411 (6th Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); *Gates v. United States*, 122 F.2d 571, 577 (10th Cir.), *cert. denied*, 314 U.S. 698 (1941); *Johnson v. United States*, 59 F.2d 42, 45 (9th Cir.), *cert. denied*, 287 U.S. 631 (1932). Venue for this crime, then, properly existed in Minnesota, the location of the addressee of the fraudulent mail. To determine whether the appellants were entitled to a transfer from the district for trial, the factors announced in *Platt* come into

play. Here the party defrauded was an insurance company based in Minnesota. The chief government witness was the vice president of Northland. Other Northland witnesses and the postal inspectors involved were from Minnesota. Most of the documents entered into evidence during the trial came from Northland's office. These factors buttress the trial court's denial of the motion for transfer. The appellants have failed to demonstrate, as required by *United States v. Phillips*, *supra*, 433 F.2d at 1368, that some substantial right has actually been affected. The motion was properly denied.

Sufficiency of Evidence.

We have recently reiterated the essential elements of a violation of 18 U.S.C. § 1341:

> "(1) a scheme conceived by appellant for the purpose of defrauding . . . by means of false pretenses, representations or promises, and (2) use of the United States mails in furtherance of the scheme." "Scheme" to defraud within the purview of this section involves some connotation of planning and pattern. Thus, intent to defraud is an essential element. It may be inferred by all the facts and circumstances surrounding a transaction. [Additionally] . . . to bring the scheme within the ambit of the mail fraud statute, the mails must be used for the purpose of executing the scheme, must be employed before the scheme reaches fruition, yet, need not be contemplated as an essential element of the scheme.

United States v. Nance, No 74-1047 (8th Cir., Aug. 20, 1974). The appellants concede that there is no doubt here that the mails were in fact employed and that this use of the mails was an integral part of the activity which the government alleged to be fraudulent. They do, however, contend that the first

requisite was not met on this record. They maintain that because McGregor consulted the Louisiana Insurance Commission, because he received advice from other agencies undergoing similar difficulties, and because Fountain paid all claims against the cancelled policies during the periods of cancellation, they did not have the requisite intent to defraud.

In reviewing the sufficiency of the evidence, we note that the verdict must be sustained if there is substantial evidence, taking the view most favorable to the government to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). *United States v. Madden*, 482 F.2d 850, 851 (8th Cir. 1973). The district court made clear in its instructions to the jury that specific intent to defraud was essential to a finding of guilt. Given the proper instructions of the district court and the scope of review, we find that there was sufficient evidence of covert conduct which could permit the jury to determine that the appellants acted with the requisite intent to deceive both Northland and the policyholders. Policyholders were never informed of the cancellation. Office personnel were instructed to conceal the cancellation practice from Northland representatives. At the outset the substitution of other documents for the cancellation notices was effectuated by McGregor in the privacy of a closed office without informing office personnel of the procedure. Northland was never reimbursed for its potential risk during the period of cancellation. Names were altered on reissued policies so that a computer would not detect the prior cancellations. Fountain, while paying claims against cancelled policies acted as an insurance company, an enterprise for which it was not licensed and could not meet capitalization requirements. Given this evidence, resolved in the light most favorable to the verdict, it is clear that

the jury, as properly instructed, found that the appellants had specific intent to defraud.

For the reasons hereinbefore expressed, the judgment of conviction is affirmed.

A true copy.

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OF APPEALS
EIGHTH CIRCUIT